Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1727

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN R. CONNOR,

Appellant,

vs.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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8 June, 1987

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COUNTERSTATEMENT OF THE CASE.

In its Statement of the Case, Movant erroneously states that Appellant "declined to offer the will for probate, as mandated by a New Jersey statute." (Db 8, ¶3-10). This statement misleadingly omits all reference to the fact that Appellant appealed the Administrator's appointment up to the level of the U. S. Supreme Court, said appeals only finally terminating in 1981, Connor v. Warren, cert. den. 449 U.S. 1079 (1981), in which case the proper designation is of a "delayed" probate. In fact, Appellant informed the Administrator (and the court) of his mother's testacy immediately after Warren's appointment and further offered to probate the will promptly upon Warren's resignation, which offer Administrator Warren declined.

Movant erroneously states that the December 3, 1979 judgment "appoint[ed] Mr. Warren

as administrator with the will annexed . . ." (Db 8, ¶5-19). The judgment referred to actually appointed one Lucas E. Phillips, Jr., as Administrator, C.T.A. (See: Db, App. A, pp. 1-3a). Ignored by Movant is the very large time gap of 16 months between the Administrator's appointment on May 26, 1978 (See: Pb, App. O, p. 28a) and his incarceration of Appellant on September 23, 1979 to get possession of decedent's will. (See: Pb, Statement of Facts, p. 6). Thus, although the Administrator knew of the existence of Mrs. Connor's will right after his ex parte appointment, he did nothing with his office for 16 months, and only moved to take possession of the will 2 months before a Wrongful Death suit had to be filed, and then delayed its probate until 10 days after limitations expired on this suit.

Movant has omitted all reference to the fact that Appellant only filed the within suit after Administrator Warren's refusal to

file same on November 16, 1979. (Db, ¶6-23). Attached hereto is a copy of the relevant portion of Warren's letter wherein he refused to file the within suit. (App. A, infra, p. 1ra).

In its discussion of the trial court's dismissal of this suit as to defendant Overlook Hospital on September 12, 1986, Movant makes no mention of the circumstance that the dismissal occurred while Appellant's second appeal was still pending before the New Jersey Supreme Court, a fact not overlooked by Judge Barbara Wecker who, on January 30, 1987, denied the dismissal motion of the defendant-physicians on the ground that "plaintiff has met the time limits set forth in the Appellate Division opinion filed May 29, 1986 because the time limits therein were tolled by the pendency of the appeal to the New Jersey Supreme Court . . ." (See: Pb, App. L, pp. 22-23a). (Emphasis added). If Appellant's second "as of right" appeal had

such a "tolling" effect on the second dismissal motion, it can only possess identical effect on the first dismissal motion of defendant Overlook Hospital, whose September 12, 1986 order of dismissal can only be void.

At the end of its Statement, Movant states that Appellant is "essentially appealing the Appellate Division's interlocutory order entered May 29, 1986. . ." (Db 10, ¶3-22). As explained and argued in Appellant's Jurisdictional Statement, he is appealing from both the New Jersey Supreme Court's order of dismissal and the decision of the Appellate Division which "finally" adjudicated the constitutional issue in this case, notwithstanding the Appellate Division's disingenuous disclaimer that it "need not reach the constitutional issue raised by plaintiff. . ." (See: Pb, App. D, p. 6a).

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ARGUMENT

I.

APPELLANT IS ENTITLED TO REVIEW UNDER 28 U.S.C. §1257(2) BECAUSE THE STATE COURTS HAVE FINALLY DECIDED THE FEDERAL QUESTION IN THIS CASE.

At no point in its brief has Movant countered Appellant's argument that he is entitled, under the exception denominated in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), to Supreme Court review of the state courts' decision on the federal issue in this case. (Appellant's argument on this point is contained on pages 56-63 of his Jurisdictional Statement). Appellant has admitted the possibility of further trial-level proceedings in this case (see: Jurisdictional Statement, p. 58), however, this state of affairs does not preclude the Supreme Court from treating "the [State] decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257. . ." Cox, supra,

at 477.

* * *

Movant erroneously asserts that Appellant is "appealing the Appellate Division's interlocutory order of May 29, 1986." (Db 11-16). (Emphasis added). The decision of the Appellate Division is in no sense an interlocutory order. That decision has reversed the trial court's dismissal of this case and reinstated the trial court's jurisdiction to proceed with the case. As such, upon the conclusion of the present appeal, the decision will become the "law of the case":

> The [appellate] mandate is a judicial precept that must be enforced as written. Relief from its directions, even though manifestly erroneous, can be had only in the appellate court whose judgment it is * * * and [it] is therefore a command to be obeyed * * * The appellate judgment becomes the law of the case; and the mandate is the direction for conforming judicial action.

Application of Plainfield-Union Water Co., 14 N.J. 296, 102 A2d 4 (1954).

The basis for Appellant's argument that the Appellate Division's May 29, 1986 decision "finally" decided the federal issue in this case is his argument that the Appellate Division's terms of remand, in "substance and effect," are a "hidden" decision affirming the constitutionality of N.J.S.A. 2A:31-2 because, upon their execution by Appellant, they would effect a waiver of Appellant's "standing" claim and cause his automatic replacement in this suit by the Administrator, C.T.A. - which result is precisely in accord with the statute's provision that only an executor or administrator, c.t.a., can file a wrongful death suit when the decedent dies testate. This argument, advanced in Appellant's Jurisdictional Statement, at pages 38-47, has also not been challenged by Movant.

* * *

Movant's argument for dismissal is basically predicated on a false application of New Jersey

Rule 2:2-5 (Db 12, ¶2-26).[1] Movant's entire argument fails, however, because the original appeal to the Appellate Division was not from an interlocutory order, but from the 1974 final trial court order dismissing the within complaint, with prejudice, as to all defendants.

Movant has similarly failed to address Appellant's argument that the criteria enunciated by the New Jersey Supreme Court in Tidewater v. Mayor and Council of Cartaret, 44 N.J. 328 (1965) require "new" constitutional questions of substance to proceed via appeal and not the discretionary writ of certification. The Tidewater decision is still applicable and its criteria have not been revised in any subsequent decision of the New Jersey Supreme Court. Consequently, "the New Jersey Supreme

---

[1] "A judgment of the Appellate Division on an appeal to it from an interlocutory order, decision or action shall be deemed to be interlocutory and not appealable to the Supreme Court as a final judgment, unless the judgment of the Appellate Division is dispositive of the action." R. 2:2-5.

Court has no discretion to decline to hear [an appeal on a federal constitutional question]. It is obliged to hear it and decide it on the merits, by reason of N.J. Const. 1947, Art. 6, sec. 5, par. 1(a). . ." United States ex rel. Herring v. Fenton, 531 F.Supp. 937 (D. N.J. 1981).

* * *

A signifigant part of Movant's first argument (Db pp. 12-14) is devoted to the September 12, 1986 order of the trial court dismissing this case as to defendant Overlook Hospital. Aside from the fact that this order is not before the Supreme Court for review, it is noted that Movant omits all reference to Judge Wecker's January 30, 1987 order (see: Counterstatement, infra), which can only import an eventual ruling that Judge Sachar was without jurisdiction to enter the dismissal for defendant Overlook Hospital because the "filing of the notice of appeal invok[ed] the jurisdiction of the appellate tribunal * * * and

divest[ed] the lower court of jurisdiction save as reserved by statute or court rule." Application of Plainfield-Union Water Co., supra, at 4. (The reference is to Appellant's notice of appeal filed with the New Jersey Supreme Court on July 25, 1986 from the Appellate Division's decision in this case).

* * *

Movant argues (Point II) that the constitutional issue "was not expressly passed on by the Appellate Division." (Db 15-19). Separate and apart from Appellant's argument that the Appellate Division's decision did, indeed, expressly uphold N.J.S.A. 2A:31-2, the law of New Jersey requires that, on an appeal to the New Jersey Supreme Court, the constitutional question need only have been "presented" to the Appellate Division. State v. De Meo, 20 N.J. 1 (1955). In fact, the New Jersey Supreme Court will even entertain constitutional questions not raised below where " 'it

is manifest that justice requires consideration of an issue central to a correct resolution of the controversy. . .' " Meeker v. Meeker, 52 N.J. 59 (1968). And the fact that a state's highest court declines review of a federal question constitutes no bar to Supreme Court review. See: Staub v. City of Baxley, 355 U.S. 313 (1958).

II.

APPELLANT HAS AT ALL TIMES ABIDED BY THE LAW. THE "STANDING" PROBLEM THAT HAS ARISEN IN THIS CASE IS A RESULT OF THE STATE COURTS' RESTRICTIVE INTERPRETATION OF N.J.S.A. 2A:31-2 AS WELL AS THE CONDUCT AND REFUSAL OF THE ADMINISTRATOR TO FILE THIS WRONGFUL DEATH SUIT.

Movant erroneously argues (Point III) that Appellant refused to probate his mother's will and that, therefore, he is somehow thereby precluded from challenging the constitutionality of N.J.S.A. 2A:31-2. The legal situation was more complicated than this simple

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argument would admit. In fact, Appellant was at the time engaged in appealing the Administrator's appointment, in consequence whereof the probate was "delayed." By virtue of New Jersey law, that appeal stayed all proceedings before the trial court:

> It is erroneous for the probate court to grant an order affecting the rights of the parties as to the subject matter of the appeal, for the reason that the proceedings before the probate court are stayed * * * The appellant, who has duly complied with the statutory regulations, deprives the probate court of any power over the subject matter during the pendency of the appeal.

Hill's Case, 55 N.J. Eq. __(Prerog. Ct. 1897). See also: Brown v. Ryder, 42 N.J. Eq. 358 (Prerog. Ct. 1886) (Where an appeal has been taken from the appointment of an administrator, his powers are suspended). Also, as recounted in the Counterstatement, infra, Appellant had early offered to withdraw his appeal and probate the will if the Administrator would first resign his office. However,

the Administrator declined to compromise.

* * *

Movant states that "[n]owhere in plaintiff's Jurisdictional Statement is it argued that he was somehow prevented from qualifying as executor." (Db 16-22). To the contrary, Appellant showed precisely how he was prevented from qualifying as executor and filing this suit when the Administrator used court process to arrest Appellant and gain possession of decedent's will just two months before limitations was due to expire on this suit. (See: Jurisdictional Statement, pp. 6-7). There was ample opportunity remaining in which Appellant might well have opted to discontinue further prosecution of the Warren appeal and probated the will in order to ensure the timely filing of this suit. That choice, however, was eliminated when Warren gained possession of the document and conveniently delayed its probate until 10 days after limitations had expired on November 24, 1977.

Consequently, on the latter date, decedent's estate was in transition from "intestate" to "testate" and a (different) Administrator, C.T.A. was replacing Administrator Warren. There is no other plausible explanation for the Administrator's actions but that he was deliberately attempting to create an "interregnum" under which no one would have statutory responsibility for filing this suit.

* * *

Movant's citation to Corbitt v. New Jersey, 439 U.S. 212 (1978) is irrelevant. This Appellant is not a criminal defendant. Nor is he responsible for the tragic death of Mary A. Connor that occurred in Overlook Hospital on November 24, 1977, which loss of life is directly attributable to the defendants herein. Because Administrator Warren failed in his non-delegable duty to file this suit, these defendants should not be permitted to escape the consequences of their actions merely

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because her son, as beneficiary, was compelled to file this suit.

* * *

Movant cites to the case of Morey v. Doud, 354 U.S. 457 (1957) in support of its argument that "[a]bsent any showing of such invidious discrimination, the legislative structure of the wrongful death statute must be upheld." (Db 17-32). In rebuttal, suffice it to be stated that: first, Morey v. Doud dealt with an economic regulation, not a wrongful death statute; and, second, the decision was specifically overruled by the U. S. Supreme Court in New Orleans v. Duke, 427 U.S. 297 (1976). The "invidious discrimination" that is prohibited by the Fourteenth Amendment has been demonstrated by Appellant in his Jurisdictional Statement where he has shown that N.J.S.A. 2A:31-2 does not treat alike "all persons similarly situated," Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1919). The statute grants all interested

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beneficiaries the right to prosecute wrongful death actions where there is an intestacy, but not at all in the event of a testacy.

* * *

For the above reasons, Appellant requests that the Supreme Court deny Movant's motion for the dismissal of this appeal and proceed to resolve the constitutional issue in this case. Otherwise, this Appellant will apparently have no other recourse but to defy the Appellate Division's offending remand terms, in order to preserve the federal issue, which course of action, absent Supreme Court review, would have been the only alternative for the Pharmacy Board in North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 163 (1973).

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CONCLUSION.

For the reasons hereinabove stated, Appellant requests that the Court deny the motion to dismiss this appeal which is properly before the Court under 28 U.S.C. §1257(2) or, alternatively, 28 U.S.C. §1257(3).

Respectfully submitted,

John R. Connor, Pro se

Dated: 8 June, 1987

APPENDIX "A"

LAW OFFICES
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November 16, 1979

Mr. John R. Connor
380 Wyoming Avenue
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Re: Complaint for Wrongful Death of Mary A. Connor

Dear Mr. Connor:

I am having difficulty in sorting out your motive in the type of communications you have been addressing to me including your most recent letter dated November 15 with the accompanying "Complaint for Wrongful Death." Under date of November 10, in a letter to Judge Gaulkin withdrawing your Order to Show Cause, you again attack the Order appointing me. Despite that, five days later, you send me a letter in which you say it is my "duty" to file a complaint on behalf of your late mother in a capacity as "Plaintiff-Administrator." The conflict in your position should be apparent to you.

[material omitted]

I point out to you that the two year statute of limitations on negligent actions may have expired in your mother's case and most

certainly will expire on the current anniversary of your mother's death which I believe was the 24th of this month. If there is any basis for a Complaint in negligence, it will have to be filed almost immediately. In view of the situation, created basically by your own actions, I can only suggest that you immediately bring this problem to the attention of competent counsel so that a proper Complaint can be filed within the next week. The Complaint you forwarded me and your check payable to the Clerk of the Superior Court in the sum of $60.00 are herewith returned.

Very truly yours,

/s/ George Warren
George Warren

GW:ad
Encls.